

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DANIEL WARMUS,

Defendant.

Case No. 1:22-cr-184  
(LJV)

February 10, 2023

TRANSCRIPT OF SUMMONS RETURN DATE FOR A MODIFICATION HEARING  
BEFORE THE HONORABLE LAWRENCE J. VILARDO  
UNITED STATES DISTRICT JUDGE

**APPEARANCES:**

TRINI E. ROSS, UNITED STATES ATTORNEY  
BY: MICHAEL DiGIACOMO, ESQ.  
Assistant United States Attorney  
Federal Centre  
138 Delaware Avenue  
Buffalo, New York 14202  
For the Plaintiff

LAW OFFICES OF DANIEL J. DUBOIS  
BY: DANIEL J. DUBOIS, ESQ.  
390 Elmwood Avenue  
Buffalo, New York 14222  
And

TEXIDO LAW OFFICE  
BY: NICHOLAS TIMOTHY TEXIDO, ESQ.  
101 Slade Avenue  
West Seneca, New York 14224  
For the Defendant

**PROBATION:**

WILLIAM BOVA, USPO  
MELISSA S. LINTON, USPO

**COURT DEPUTY CLERK:** COLLEEN M. DEMMA

**COURT REPORTER:**

ANN M. SAWYER, FCRR, RPR, CRR  
Robert H. Jackson Courthouse  
2 Niagara Square  
Buffalo, New York 14202  
Ann\_Sawyer@nywd.uscourts.gov

1 (Proceedings commenced at 1:09 p.m.)

2 THE CLERK: All rise. United States District Court  
3 for the Western District of New York is now in session, the  
4 Honorable Lawrence J. Vilaro presiding.

5 THE COURT: Please be seated.

6 THE CLERK: 22-CR-184, United States of America  
7 versus Daniel Warmus.

8 Assistant United States Attorney Michael DiGiacomo  
9 appearing on behalf of the government.

10 Attorneys Daniel DuBois and Nicholas Texido appearing  
11 with defendant. Defendant is present.

12 Also present are U.S. Probation Officers William Bova  
13 and Melissa Linton.

14 This is the summons return date for a modification  
15 hearing.

16 THE COURT: Good afternoon, everybody.

17 ALL PARTIES: Good afternoon, Judge.

18 THE COURT: So I'm in receipt of a few things. One  
19 is the request for summons and modification of conditions or  
20 term of supervision from the probation office.

21 I've also received a letter from John C. Welch, Jr.,  
22 of the County of Orleans, he's the chief administrative  
23 officer there.

24 I've received a letter from the Sheriff of Erie  
25 County, actually from -- it's written by James P. Welch, who

1 is the commander investigative serves of the Erie County  
2 Sheriff's Office.

3 I've received a letter from the office of the Yates  
4 County Administrator signed by Winona B. Flynn, who is the  
5 county administrator in Yates County.

6 And I received a letter from the City of Elmira,  
7 New York, Police Department signed by Anthony A. Alvernaz, the  
8 chief of police.

9 Do you have all this?

10 MR. DuBOIS: Yes, Your Honor.

11 THE COURT: And do you have all this, Mr. DiGiacomo?

12 MR. DiGIACOMO: I do, Your Honor. Thank you.

13 THE COURT: Okay. So who wants to talk? Who wants  
14 to --

15 MR. DiGIACOMO: Well --

16 MR. DuBOIS: After you.

17 MR. DiGIACOMO: All right. Judge, I'm going to say  
18 in my 20 years of being in the office, I've yet to see a  
19 modification petition dealing with this issue.

20 I have -- I did have the opportunity to speak with --  
21 with counsel, and it's really -- we both agree that it's  
22 really not a factual issue, but we think it's more of a legal  
23 issue as to whether or not the Court can impose the  
24 modification as sought by the probation department.

25 THE COURT: I think there's some First Amendment

1 issues there.

2 MR. DiGIACOMO: Correct. And that's obviously the  
3 position of Mr. Warmus.

4 And, Judge, and again, I don't want to sit here and  
5 debate the law, but we think it's more of a -- it's not like  
6 we've seen in a lot of modification petitions or supervised  
7 release petitions. It's not a question of fact. The video  
8 exists. It's more of a legal issue of can the Court amend it  
9 to do this without -- if -- if they decide to do it, what's  
10 the extent without causing a significant infringement on that  
11 right.

12 THE COURT: Yeah, so it's can the Court do it, and  
13 it's also should the Court do it. Because even if I can, you  
14 know, I've got -- I've got concerns about Mr. Warmus's First  
15 Amendment rights here. So -- so even if I thought I might be  
16 able to do it within the constraints of the First Amendment, I  
17 still might be reluctant to do it given -- given everything  
18 that's going on.

19 Tell me this. Has he done anything -- is it the  
20 government's position or the probation office's position that  
21 he's done anything that violates any condition of his  
22 supervised release?

23 MR. DiGIACOMO: Under the terms and conditions of his  
24 current supervision imposed out of Washington, D.C., it's my  
25 understanding Mr. Warmus has not violated any one of those

1 terms and/or conditions.

2 THE COURT: Right.

3 MR. DiGIACOMO: So this is just a modification,  
4 Judge.

5 THE COURT: And I get the concerns that the county  
6 has because of the threats that are made and the phone calls  
7 and the disruption and things like that. I get that, I  
8 understand that, and I sympathize with that.

9 But he's not making those threats, he's not -- he's  
10 not doing those things.

11 So, I mean, I'm willing to, if you folks want to make  
12 a submission that deals with the First Amendment issues, and  
13 whether I can and should impose conditions like this within  
14 the constraints of the First Amendment, the significant  
15 constraints of the First Amendment, I'm certainly willing to  
16 read anything you give me. But I can tell you that based on  
17 what I've seen and heard on the tape -- I did not watch the  
18 entire tape, I watched the first 30 minutes or 40 minutes, it  
19 seemed like -- I told my clerk it seemed like Groundhog Day  
20 after a while because it was going over and over again, the  
21 same thing, and I didn't think it was going to change  
22 appreciably.

23 I thought the security guard was a hero on the tape.  
24 I thought he -- he was terrific, and sort of cut through all  
25 the red tape in a very nice, appropriate, meaningful way.

1           And the I've gotten a couple other letters about  
2 Mr. Warmus from, you know, government officials saying that,  
3 you know, he comes and he puts them to the test, and watches  
4 what they're doing, and tapes what they're doing, but does it  
5 in a polite, respectful, not-inappropriate way. The tape may  
6 have pushed the envelope a little bit, bu, you know, there are  
7 no laws about pushing envelopes.

8           So tell me, what do you want to do? And I'll hear  
9 from probation, too. What do we want to do?

10           MR. DiGIACOMO: Your Honor, may I speak with  
11 probation for a moment?

12           THE COURT: Yeah, absolutely.

13           MR. DiGIACOMO: Thank you.

14           (Off the record at 1:15 p.m.)

15           (Back on the record at 1:17 p.m.)

16           THE COURT: Let's go back on the record.

17           MR. DiGIACOMO: Your Honor, I thank you for the  
18 opportunity to speak with the probation department. And I  
19 know you asked the probation department if they had anything  
20 to say, and I believe they do wish to address the Court. And  
21 then after they address the Court, I will circle back to the  
22 Court's question as to with respect to a submission if that's  
23 allowed.

24           THE COURT: Terrific.

25           USPO BOVA: Thank you, Your Honor. So the probation

1 office, you know, has a lot of responsibilities when it comes  
2 to supervising people out in the community. And one of those  
3 responsibilities is, you know, being the eyes and ears for the  
4 Court, to bring about information so Your Honor can make  
5 educated decisions on the success of Mr. Warmus going forward.

6 And the probation office is proposing this  
7 modification request actually looking out for Mr. Warmus to  
8 prevent another -- if he did post another video and similar  
9 conduct did happen, he could be held potentially liable if  
10 someone does something unfortunate in a video that he posts.  
11 So that's the reason behind our request.

12 And we're looking out for him, because if that would  
13 become a new crime, that could potentially be a violation of  
14 his mandatory condition of violating another state or local  
15 crime. So that is where the probation office is coming from  
16 to address Your Honor.

17 THE COURT: And I don't -- I don't mean to be in any  
18 way critical of the probation office for bringing this to my  
19 attention. I'm not. I just think that there are significant  
20 First Amendment issues here that we would need to deal with  
21 before I did something like this.

22 And let me say this, too. I'm thrilled to see good  
23 lawyers here with Mr. Warmus because they can advise him on  
24 the sorts of things that you're talking about. And I don't  
25 doubt for a second that what you're trying to do is to set

1 Mr. Warmus up to succeed and not to -- and so to protect him.  
2 But he's got to make those decisions, right?

3 I mean, he's got First Amendment rights, and he's got  
4 to make those decisions as to whether he's doing something  
5 that might cross the legal/illegal line. And I'm glad he's  
6 lawyers with him, because they can advise him on those kinds  
7 of questions.

8 So, I mean, you say he could be held liable if  
9 somebody were to do something. I guess that would depend on  
10 what his role in the somebody doing something was.

11 USPO BOVA: Yes, Your Honor.

12 THE COURT: I get that. I mean, look it, I get in  
13 today's world, people post things and it results in other  
14 people doing things that are inappropriate, and there might be  
15 a -- a desire to hold the person who did the first posting  
16 responsible, but that's not always the law.

17 And, so, well, I've said enough. Mr. DiGiacomo, what  
18 do you have to say?

19 MR. DiGIACOMO: Thank you, Your Honor.

20 Your Honor, after speaking with probation, although  
21 in light of the Court's concerns, I would ask for an  
22 opportunity for the parties to be able to submit something for  
23 the Court to consider in the form of a -- I don't know, I  
24 don't think it will be an extensive brief, it will be enough  
25 to cover, but I'm thinking maybe if you could provide -- if



1 the Court would prefer simultaneous briefing or how Your Honor  
2 would prefer something like that. But I'm asking from the  
3 government's perspective if we could have at least three weeks  
4 for our submission. That would be reasonable?

5 THE COURT: Any problem with that?

6 MR. TEXIDO: No problem from us, Your Honor.

7 THE COURT: How much time would you need?

8 I would want your submission first, I would want a  
9 defense response, and then another reply from the government.

10 MR. TEXIDO: I would say then three weeks.

11 THE COURT: So three weeks from today is what,  
12 Ms. Demma?

13 THE CLERK: It is March 3rd.

14 THE COURT: March 3rd.

15 And then March 24th for the defense submission.

16 THE CLERK: Yes.

17 THE COURT: And then a submission back from the  
18 government -- how about a week for a reply?

19 MR. DiGIACOMO: That's fine, Judge.

20 THE COURT: Okay. A week for a reply.

21 And then if I need oral argument, I'll -- I'll  
22 schedule oral argument. I don't know if I will or not. But  
23 I'm, as I said, I'm glad to see good lawyers here on the  
24 left-hand side of the courtroom because -- at least my  
25 left-hand side, because I share probation's concern, and I

1 don't want Mr. Warmus crossing any lines. You know, I don't  
2 know that he did from what I saw, from what I've seen, and the  
3 letters certainly suggest, at least some of the letters  
4 suggest, that he has not. That he's been, you know, a  
5 watchdog. He wants to be a watchdog, right? And he's been a  
6 watchdog, and he's done it in an appropriate way. That's  
7 great.

8 But I'm glad he's getting legal advice on these kinds  
9 of things because I think he needs that, and I can't give it  
10 to him anymore. In my former life, I could have, but --

11 MR. DiGIACOMO: Judge, is it fair to say then, in  
12 light of what the Court has put on the record, that the Court  
13 is not going to temporarily impose such a condition --

14 THE COURT: No, I'm not going to temporarily impose  
15 such a condition. No. And I appreciate the request. And as  
16 I said, you know, I'm -- and I know Mr. Warmus will rely on  
17 defense counsel for -- to -- to decide what he can do and what  
18 he can't do. But, no, I'm not going to impose this now.

19 I'll read what you have to read, and decide what to  
20 do after that.

21 MR. DiGIACOMO: Thank you.

22 THE COURT: Okay. Anything more you want to do this  
23 afternoon?

24 MR. DiGIACOMO: Nothing from the government,  
25 Your Honor.

1 THE COURT: Anything more from probation this  
2 afternoon?

3 USPO BOVA: No, Your Honor.

4 THE COURT: Anything more from the defense?

5 MR. TEXIDO: Yes, Your Honor, just two brief things.

6 Number 1. On the summons, it's listed as a petition  
7 for probation violation. And when we -- he was informed that  
8 he had to be booked when we got here. That's -- and so he was  
9 booked, because we listen to what we're told.

10 But I guess my concern is this showing up on his  
11 record as a violation of probation when it's, in fact, not.

12 THE COURT: Yeah, I don't think it is a violation of  
13 probation.

14 USPO BOVA: It is not, Your Honor. I'm not sure why  
15 that was included on the summons. I can follow up with the  
16 clerk's office, maybe, but this is just a modification request  
17 hearing. There has been no violation.

18 THE COURT: Yeah. I asked for a summons to be  
19 issued. I didn't -- I didn't say anything about any  
20 violation, so -- and you don't think there's a violation,  
21 right?

22 MR. DiGIACOMO: No, I've been -- no, the --

23 THE COURT: So, I will say for the record, there is  
24 no violation charged here. Do you want me to do anything  
25 more?

1 MR. DuBOIS: Well, Judge, the fact that he was booked  
2 by, he was fingerprinted, and mugged, and DNA cross-referenced  
3 about an hour ago. So we just want to make sure that if  
4 someone were to do a criminal history on him, it's not going  
5 to show that there was, in fact, a violation for which he was  
6 booked for, because he technically got booked.

7 USPO BOVA: It is my understanding, Your Honor, that  
8 individuals who come in for a summons do report to the  
9 marshals to be processed. So if Your Honor would like, I can  
10 follow up with the marshals and the clerk's office to see if  
11 there's a resolution to this.

12 THE COURT: Yeah. Why don't you work with probation  
13 and make sure that things are the way you would like them to  
14 be because, no, he's not charged with a violation, and nor do  
15 I think there should be any record that he was charged with a  
16 violation.

17 MR. DuBOIS: Thank you, Judge.

18 MR. TEXIDO: And then, Your Honor, the final matter,  
19 and I'm not sure how the Court wants us to go about with this,  
20 so I'm going to put it out there.

21 There is a condition on his original conditions that  
22 I think will be implicated by the arguments that are being  
23 made by both sides here. That condition --

24 THE COURT: The condition imposed by Judge Friedman?

25 MR. TEXIDO: Yes. That condition reads that he not

1 enter a police station without prior court approval. And  
2 that's pretty much verbatim how it reads. So --

3 The way it reads, number 1, if he's standing there  
4 bleeding from a stab wound in the parking lot of a police  
5 station, he can't walk in and report it, number 1.

6 Number 2. I think the arguments we're making, the  
7 First Amendment and policy arguments here, would apply to that  
8 condition, as well. I don't know if the Court would need us  
9 to file a cross petition or a petition, or we can --

10 THE COURT: Yeah. So let's do this. So let's do  
11 this. If you want to seek relief from a condition that's in  
12 the conditions that Judge Friedman imposed, you've got three  
13 weeks to do that. The government has three weeks to respond  
14 to that. So we're just going to flip the schedule. And then  
15 you've got a week to reply.

16 And, again, we'll do the same thing with respect to  
17 that.

18 MR. TEXIDO: So on separate submissions, Your Honor?

19 THE COURT: Separate submissions.

20 MR. TEXIDO: Okay.

21 THE COURT: Two separate submissions. And don't make  
22 them long, guys, they don't need to be --

23 MR. DiGIACOMO: 75, 100 pages?

24 THE COURT: 75 to 100, yeah. Can we say 15? Is  
25 that -- a 15-page limit on everything?

1 MR. TEXIDO: Yes, I think that will be more than  
2 enough, Judge.

3 THE COURT: Okay. Terrific.

4 And if you have an alternative, I mean, I hear what  
5 you're saying, and what you're saying makes some very  
6 intuitive sense to me. What I might do if I were in your  
7 shoes is talk to the fellow on the other side of the aisle  
8 before you make your submission because, you know, the  
9 government and probation may very well agree to some  
10 modification along the lines that you're talking about. And  
11 then you can ask me to do something more than that.

12 So you can say, look it, we've got an agreement that  
13 if he's been stabbed and he's bleeding, he can go into a  
14 police station to, you know, get himself taken care of, and  
15 get the culprit chased down. But in addition to that, Judge,  
16 I'd like you to allow him to go into any police station for  
17 any reason at all, and here's why. You can do that, too.

18 MR. TEXIDO: Okay. Thank you, Your Honor.

19 THE COURT: Okay?

20 MR. TEXIDO: I appreciate that.

21 THE COURT: Anything else?

22 MR. DiGIACOMO: Nothing else from the government.

23 THE COURT: Anything else from defense?

24 MR. DuBOIS: No, Your Honor.

25 THE COURT: Anything else from probation?

1 USPO BOVA: No, Your Honor.

2 THE COURT: Okay. Thank you very much, everybody,  
3 and maybe we'll see you in a few weeks.

4 MR. TEXIDO: Thank you.

5 THE CLERK: All rise.

6 (Proceeding concluded at 1:26 p.m.)

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14 **CERTIFICATE OF REPORTER**

15

16 In accordance with 28, U.S.C., 753(b), I  
17 certify that these original notes are a true and correct  
18 record of proceedings in the United States District Court for  
19 the Western District of New York on February 10, 2023.

20

21

22 s/ Ann M. Sawyer  
23 Ann M. Sawyer, FCRR, RPR, CRR  
24 Official Court Reporter  
25 U.S.D.C., W.D.N.Y.